

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KELLY BOLDING, *et al.*,

V.

BANNER BANK,

Defendants.

Case No. C17-0601RSL

**ORDER REGARDING DEFENDANT'S
MOTION TO COMPEL PRODUCTION
OF FEE AGREEMENTS**

This matter comes before the Court on “Defendant Banner Bank’s Motion to Compel Fee Agreements.” Dkt. # 189. The Ninth Circuit has determined that certain types of incentive arrangements between the named plaintiffs and class counsel are relevant to the evaluation of the adequacy of the representation under Fed. R. Civ. P. 23. *See Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013) (conditional incentive awards that require class representatives to support the proposed settlement make them inadequate representatives of the absent class members); *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959-60 (9th Cir. 2009) (finding that a fee agreement in which counsel promised to request class representative awards on a sliding scale based on the amount recovered disjoined the financial interests of the representatives from the class, creating a disincentive for going to trial in favor of settling at the top end of the scale, a disincentive for pursing non-monetary remedies, the appearance of “shopping plaintiffships,” and the potential for ethical violations); *In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002) (“The presumptive lead plaintiff’s choice of counsel and fee

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1 arrangements may be relevant in ensuring that the plaintiff is not receiving preferential treatment
 2 through some back-door financial arrangement with counsel, or proposing to employ a lawyer
 3 with a conflict of interest.”). The existence of such preferential arrangements or other conflicts
 4 with absent class members are therefore legitimate targets of discovery. Because the Court has
 5 an on-going obligation to ensure that class-wide adjudication or settlement of the claims is
 6 appropriate (*see United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Industrial & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010)), the fee structure
 7 remains relevant even though the classes have already been certified. *See also Radcliffe*, 715
 8 F.3d at 1164 (“We once again reiterate that district courts must be vigilant in scrutinizing all
 9 incentive awards to determine whether they destroy the adequacy of the class representatives.”).

10 *Radcliffe, Rodriguez, and Cavanaugh* arose in contexts other than a discovery dispute. In
 11 that context, a number of district courts within the Ninth Circuit have been unwilling to compel
 12 production of the written fee agreements in the absence of a reasonable basis for suspecting that
 13 an improper incentive agreement or conflict exists. *See Larsen v. Coldwell Banker Real Estate Corp.*, 2011 WL 13131127, at *3 (C.D. Cal. Oct. 4, 2011) (where there is no evidence of a
 14 suspect relationship or conflict, the fee agreement was deemed irrelevant and not likely to lead to
 15 the discovery of admissible evidence); *In re Google AdWords Litig.*, 2010 WL 4942516, at *4-5
 16 (N.D. Cal. Nov. 12, 2010) (noting that retainer agreements should not be discoverable in class
 17 actions where there is no evidence of a suspect incentive structure or conflict of interest). These
 18 courts implicitly or explicitly acknowledge, however, that defendants must be given some
 19 opportunity to obtain evidence regarding the fee arrangements, even if production of the
 20 agreement itself will not be compelled absent reasonable suspicion. *Pappas v. Naked Juice Co. of Glendora*, 2012 WL 12885109, at *6 (C.D. Cal. Dec. 5, 2012) (accepting plaintiffs’ assertions
 21 that retainer agreements are not relevant to class certification and that the depositions of the
 22 proposed class representatives would provide an adequate opportunity for defendant to explore
 23 issues of adequacy prior to class certification); *Larsen*, 2011 WL 13131127, at *3 (noting that
 24

1 defendant would have the opportunity to test the veracity of plaintiff's declarations regarding the
2 fee provisions through depositions of the named plaintiffs).

3 In this case, defendant attempted to question the class representatives at their depositions
4 regarding the process by which they retained counsel, the terms of their fee agreements, and who
5 controls the decisions regarding settlement or trial. Plaintiffs' counsel objected, asserting that the
6 information was privileged and instructing the witnesses not to answer. In the place of live
7 witness testimony with the concomitant ability to ask follow-up questions, plaintiffs offer the
8 static declaration of their counsel denying the existence of a conflict or improper incentive
9 payments. Dkt. # 196 at ¶¶ 5-6. Counsel's declaration is effectively unchallengeable, however,
10 and defendant is not required to forego permissible methods of discovery simply because
11 plaintiffs would prefer to provide factual evidence through a declaration.

12 Having reviewed the submissions of the parties, the Court finds that plaintiffs cannot
13 deprive defendant of the opportunity to gather relevant information regarding the incentive and
14 decision-making structures that govern the class representatives' relationships with counsel
15 through depositions and then object to requests for the fee agreements on the ground that there is
16 no reasonable basis to suspect the existence of a conflict or improper incentives. In the context
17 presented here, plaintiffs' relevance objection is overruled. Plaintiffs shall either supplement
18 their responses to Requests for Production Nos. 25 and 29, including production of the fee
19 agreement(s) between the named plaintiffs and their counsel,¹ or make the named plaintiffs
20 available for additional questioning. If plaintiffs opt not to produce their fee agreements, the
21 renewed depositions shall be conducted by video and shall be limited to questions regarding
22 plaintiffs' fee arrangements and incentive/decision-making structures. Plaintiffs will be required
23 to pay defendant's attorney's fees and bear the costs associated with the court reporter and the
24 videographer.

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26 ¹ To the extent the Requests for Production encompass privileged materials (such as billing
records that reflect the advice or strategy of counsel), plaintiffs shall prepare a privilege log.

1 Dated this 6th day of July, 2020.

2 Robert S. Lasnik

3 Robert S. Lasnik

4 United States District Judge